REPORT
ON
CHILD WITNESSES

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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In the *Report on Child Witnesses*, the Ontario Law Reform Commission attempts to achieve three principal objectives: (1) to challenge the assumptions on which many of our legal rules are based regarding the unreliability of children's evidence; (2) to encourage the Legislature to repeal legal rules which impede child witnesses from telling the court what they witnessed; and (3) to introduce protective devices into the legal system to ensure that the court receives as complete, coherent and accurate an account as possible from the child witness. The report demonstrates that many of the common law and statutory rules applicable to child witnesses are based on erroneous notions about the unreliability of children's testimony. Psychological studies conducted in the last twenty years show that the traditional views about children's evidence lack empirical foundation. The current research clearly indicates that children do have adequate cognitive skills to understand or to describe what they have witnessed, children can differentiate fact from fantasy, and children have an ethical sense and are no more likely to fabricate evidence than are adults.

The Commission recommends that the oath be abolished and that it be replaced with a promise to tell the truth. The rules in the Ontario *Evidence Act* have made it extremely difficult for children to be qualified as witnesses with the result that judges may be deprived of hearing potentially valuable evidence. The Commission's view is that the oath requirement is essentially a test of religious understanding rather than a test of the child's ability to understand the importance of being truthful. The transformation of Ontario from a religious to a largely secular society further accentuates the inappropriateness of the oath.

The Commission proposes that the provision in the *Evidence Act* requiring corroboration of a child's unsworn evidence be repealed. In addition, the Commission recommends that there be no rule of any kind that requires a court to assume that the uncorroborated evidence of a child is unreliable. The Commission makes these recommendations for the following reasons. First, there is no scientific basis for assuming that a child is incapable of furnishing reliable evidence. Second, there is often no direct evidence, either physical or eyewitness, to corroborate the child's testimony. A further reason for the abolition of these legal rules is that it is unreasonable and unfair to have such restrictive evidentiary rules for children and not for adult witnesses.

Reform of the hearsay rule for the statements of children is another important recommendation in the report. In many cases, the hearsay evidence of the child is the best evidence of the subject matter being litigated and constitutes the only substantive evidence of the subject of the proceedings. The Commission recommends that the hearsay statements of a child be admissible, if, in the opinion of the judge, the statements are sufficiently reliable. The court can then assess the weight to be accorded to the child's out-of-court statements. The Commission believes that this recommendation will introduce clarity into the law and will permit what may be extremely reliable evidence to to be considered by the courts.

In the final section of the report, the Commission proposes that legislation should be introduced which accommodates children who give evidence in civil proceedings. The vulnerability of child witnesses should be acknowledged and the manner in which children give evidence modified accordingly. Legislation which authorizes videotaped testimony and which permits child witnesses to testify behind a screen or by closed-circuit television will help ensure that reliable evidence is presented and heard. Children should be protected in the court process in order to tell their story as easily, accurately and comprehensively as possible.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The oath should be abolished as a test of competency for child witnesses. A simple promise to tell the truth should be the qualification requirement for child witnesses in Ontario civil proceedings.

2. Where in the opinion of the court, a child does not understand the promise to tell the truth, the judge shall nevertheless hear the evidence and may act on it if, at the end of the case, the judge is satisfied that the evidence is reliable.

3. The presumption that a child under fourteen years is an incompetent witness should be abolished. The Ontario *Evidence Act* should be amended to provide that all individuals, including children, are presumed competent witnesses.

4. The distinction between sworn and unsworn testimony for child witnesses should be abolished.

5. The corroboration rule in section 18(2) of the Ontario *Evidence Act* for the unsworn testimony of the child should be repealed.

6. A child's testimony should not be automatically labelled as untrustworthy and unreliable solely because the evidence is being offered by a child. The rule in *Kendall v. The Queen* should be statutorily abolished.

7. The hearsay statements of a child are admissible if, in the opinion of the judge, the statements are sufficiently reliable.

8. All child witnesses should be permitted to testify behind a screen. In cases in which a screen is used, provision should be made to enable the party against whom the child is tendering evidence to watch the child and to observe his or her demeanour while giving evidence.

9. All child witnesses should be allowed to testify by closed-circuit television. In cases in which the child testifies by closed-circuit television, the party against whom the child is tendering evidence

should be permitted to communicate with counsel while watching the child's testimony.

10. Videotaped interviews of a child are admissible if, in the judge's discretion, the videotapes are sufficiently reliable.

11. Videotaped testimony of a child, in which the child is examined and cross-examined by counsel in advance of trial in the presence of a judge, should be permitted. Provision should be made to enable the party against whom the child is tendering evidence to view the proceedings through a one-way screen or through the medium of closed circuit television.

12. Child witnesses should be permitted to have the presence of a support person of their choice during their testimony. Unless the court consents, the support person should not be an individual who is involved as a witness in the proceedings.

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